Supreme Court, U. S.
FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-138

MARY ANN PRADER, SUSAN PRADER TUCKER, ELLEN SUE STEWART and SANDRA STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

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No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINIONS OF THE COURT BELOW

On July 3, 1974, the United States Court of Appeals for the Seventh Circuit issued an opinion affirming the decision of the United States District for the Northern District of Illinois, Eastern Division, denying the Motion to Suppress in the instant cause. The Court of Appeals, in addition, ruled valid the Petitioners' guilty pleas, entered before the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported, and is set forth as Appendix A to this Petition. The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, No. 73 CR 632, denying the Motion to Suppress, is not reported and is set forth as Appendix B to this Petition.

JURISDICTIONAL STATEMENT

The Judgment and opinion of the Court of Appeals affirming Petitioner's judgments and sentences was entered on July 3, 1974. Petition for rehearing was denied on July 25, 1974. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Can mere association with a person found to be concealing contraband provide the basis for search under

the clothing of a person who already has been inspected by customs officials and has passed without suspicion through customs checkpoint into public area or an airport terminal?

2. Whether, where a customs inspector stated he had "reasonable suspicion" to believe contraband was concealed in midriff area of Petitioner's body and Petitioner "voluntarily" bared her midriff, disclosing complete absence of contraband, these acts can be said to create new "reasonable suspicion" to justify search of other areas of her body?

3. Whether, where Petitioners were not advised by the court accepting their guilty pleas of a special mandatory three-year parole term, the pleas must be vacated?

4. Whether, where the record in a guilty plea discloses the existence of a bargain to which the court did not give full effect, the guilty plea should be vacated, and a voluntariness hearing conducted?

5. Whether, where the trial court before which a guilty plea is entered fails to comply in any substantial manner with Rule 11 and the relevant interpretive court decisions, the guilty pleas must be vacated?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution, Title 21, United States Code, Section 963, and Rule 11 of the Federal Rules of Criminal Procedure (in applicable form and as amended effective August 1, 1974) are involved herein and are set forth in Appendix C.

STATEMENT OF THE CASE

The facts in this case present a situation in which "reasonable suspicion" is said to exist where a Customs Inspector perceived a "bulge" in the midriff area of Petitioner Susan Prader Tucker while she was passing through a customs line (Tr. 16, 17, 24; 12/19/73).

"Suspicion," according to the testimony of this Customs Inspector, developed in his mind when Petitioner Tucker passed through the Customs Inspection line at O'Hare International Airport, Chicago. He testified:

> Q. At the time you stopped her, did you observe anything unusual about her?
>
> A. Yes, I did. In the area of her stomach, I noticed a bulge that appeared to be unusual to me because she had a slender figure at the time. It sort of made me suspicious.
>
> Q. Was there anything about her clothing that made you suspicious?
>
> A. Yes. It sort of was out farther than it would appear that it should have been because of the size of her frame.
>
> Q. What kind of dress did she have on, if you can remember?
>
> A. As I remember, it sort of fitted rather tightly at the waistline and then sort of flared out to a length to perhaps her ankles.

On cross examination, this Inspector confirmed that his suspicion focused on Petitioner Tucker's midriff (Tr. 24;

-/19/73). He testified that her dress at trial displayed a loose area similar to the one he had observed on the day he ordered the search (Tr. 24; 12/19/73). Petitioner Tucker was pregnant at trial (Tr. 25; 12/19/73).

The male customs inspector informed two female Custom's employees (one a cashier and the other employed in an unclarified capacity) (Tr. 30-31; 12/19/73) that he was suspicious of Petitioner Tucker "because of her long clothing and mostly because she appeared to have a bulge on her abdomen below her waist" (Tr. 31; 12/19/73).

The male inspector ordered a "continuing examination", which "continued" into a private detention room in which the two female employees informed Petitioner Tucker she had been brought back because of a bulge around her waist (Tr. 31; 12/19/73).

In response to this, Petitioner Tucker unzipped her skirt and lowered it several inches (Tr. 31; 12/19/73), to the top of her legs (Tr. 13; 12/19/73). She also raised her top to right below her breasts (Tr. 14; 12/19/73). This act disclosed no contraband—only Petitioner's bare stomach and abdomen (Tr. 31; 12/19/73).

At this point, "reasonable suspicion" concerning concealment in the midriff area having been unfounded, the female Customs employee testified that she developed "rasonable suspicion" anew because Petitioner Prader had voluntarily bared her midriff (Tr. 31-32; 12/19/73).

The female Customs employees thereupon lifted Petitioner Tucker's skirt to above Petitioner's knees (Tr. 32; 12/19/73), went underneath her socks, removed bandages on her leg, and discovered some small packages (Tr. 32,

40; 12/19/73). Later these packages were found to react positively to a field test (Tr. 34; 12/19/73).

Petitioner Tucker had passed through the customs line initially with her sister, Petitioner Mary Ann Prader (Tr. 16; 12/19/73). The male Customs inspector had, at the time they were in line, observed them talking to each other in a friendly manner (Tr. 16; 12/19/73). He allowed Petitioner Mary Ann Prader to pass through the line, having observed nothing suspicious about her (Tr. 25; 12/19/73).

Petitioner Mary Ann Prader exited the customs area and stood in a public waiting area beyond the doors to the customs area (Tr. 8; 12/19/73). After the male customs inspector had been informed there was something concealed underneath the clothing of Petitioner Tucker and apparently before the matter found had been field-tested for narcotic content (Tr. 17, 33-34; 12/19/73), the male customs inspector went outside the door to the Customs area in pursuit of Petitioner Mary Ann Prader (Tr. 18, 28-29; 12/19/73). He took her back into the area, (Tr. 18; 12/19/73), caused her skirt to be lifted up by the female customs employees (Tr. 35-36, 41; 12/19/73) and they discovered contraband (Tr. 41; 12/19/73).

Subsequent to their arrest, Petitioners Tucker and Mary Ann Prader placed phone calls and supplied information, pursuant to instructions of federal agents, which eventually led to indictment of certain other persons among these Petitioners Ellen Sue Stewart and Sandra Stewart. The Stewart sisters were charged with conspiracy in violation of 21 U.S.C. §963 to import cocaine into the United States in violation of 21 U.S.C. § 952 (a) and to distribute

cocaine outside the United States knowing that it would be imported in violation of 21 U.S.C. § 959. In addition, Petitioners Mary Ann Prader and Susan Prader Tucker were charged with importing cocaine in violation of § 952 (a) and the Stewart sisters with distributing cocaine knowing it would be imported, in violation of § 959.

Subsequent to the trial Court's denial of Petitioners' Prader and Tucker Motion to Suppress, upon which their co-indictees relied, all Petitioners entered guilty pleas (Petitioners respectfully commend to this Honorable Court's attention the brief transcripts of Proceedings on January 16 and 17, 1974 in the District Court to best illustrate the omissions of the trial court regarding these guilty pleas.) They were informed by the trial court that they had a right to be tried with or without a jury, but the Stewarts were not advised that they had a right to confront witnesses. Nor were any of the Petitioners advised that they had to be proven guilty beyond a reasonable doubt. The trial court accepted the Stewarts' guilty pleas with respect to Count III of the Indictment (violation of 21 U.S.C. § 952(a) despite that Court's pretrial ruling that venue as to Count III was questionable. The trial court failed to inquire as to any of the Petitioners' real understanding. In addition, nothing at all was said concerning what constituted a violation of 21 U.S.C. 963, although this charge was part and parcel of the conspiracy count, nor was any inquiry made concerning whether Petitioners were under the influence of narcotics at the time of the alleged offense or at the time of their guilty pleas. Neither were any of the Petitioners told by the Court that a special three year parole term

was mandatory were they to be incarcerated after their guilty plea.

Petitioner Mary Ann Prader was sentenced to concurrent six month terms in the Custody of the Attorney General, on Counts I and II; Petitioner Susan Prader Tucker to concurrent one year terms in the custody of the Attorney General on Counts I and II. Petitioner Ellen Sue Stewart was sentenced to concurrent six month terms in the custody of the Attorney General on Counts I and III; Petitioner Sandra Stewart was sentenced to concurrent one year terms in the custody of the Attorney General on Counts I and III. Each Petitioner received a mandatory three year parole period to run consecutive to the respective sentences.

REASONS FOR GRANTING THE WRIT

I.

MERE ASSOCIATION WITH A PERSON FOUND TO BE CONCEALING CONTRABAND CANNOT PROVIDE THE BASIS FOR SEARCH UNDER THE CLOTHING OF A PERSON WHO ALREADY HAS BEEN INSPECTED BY CUSTOMS OFFICIALS AND HAS PASSED WITHOUT SUSPICION THROUGH CUSTOMS CHECKPOINT INTO PUBLIC AREA OR AN AIRPORT TERMINAL.

A male Customs inspector testified that he observed Petitioner Mary Ann Prader coming through the customs line behind Petitioner Susan Prader Tucker, her sister, and that they appeared to be friendly with each other (Tr. 16; 12/19/73). The inspector testified that he observed a suspicious bulge in the midriff area of Petitioner Tucker, but explicitly stated he saw nothing suspicious about the Petitioner Mary Ann Prader (Tr. 25; 12/19/73).

Only after a search of Petitioner Tucker which disclosed packages, and before those packages were field tested, did the Customs Inspector pursue Petitioner Mary Ann Prader, who had already passed through the Customs search area into a public waiting area of the airport (Tr. 8, 26, 32, 34, 40; 12/19/73).

The Seventh Circuit approved the subsequent search of Petitioner Mary Ann Prader, quoting from the District Court's opinion (Appendix B) denying the Motion to Suppress in the instant case, and citing *United States* v. *Glaziou*, 402 F. 2d 8 (2d Cir. 1968).

In *Glaziou,* the Court held that the officers had independent suspicion as to each defendant searched.[1] In the instant case, the Customs inspector specifically testified he had *no independent suspicion* as to Petitioner Mary Ann Prader (Tr. 25; 12/19/73).

The Seventh Circuit's decision in the instant case (and *Glaziou* in the manner in which the Seventh Circuit interpreted it) conflict with a long line of cases holding that "mere association" with a person to which cause to search obtains does not justify the search of a companion on which no independent cause has been focused. In *United States* v. *DiRe,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) this Honorable Court held that the search of an occupant was not justified as an incident to a search of an automobile for counterfeit gasoline ration coupons. See also *Sibron* v. *New York,* 392 U.S. 40, 88 S.Ct. 1889, 206 L.Ed. 2d 917 (1968). Several Circuits over the years have followed the wisdom put forth in *DiRe. Bynum* v. *United States,* 262 F. 2d 465 (D.C. Cir. 1958); *United States* v. *Viale,* 312 F. 2d 595 (2d Cir. 1963); *United States* v. *Bazinet,* 462 F. 2d 982 (8th Cir. 1972); *United States* v. *Williams,* 459 F. 2d 44 (9th Cir. 1972); *United States* v. *Murray,* 354 F. Supp. 604 (Ed. Penn. 1972).

The Seventh Circuit's attempt to carve out a theory justifying searches near (but not within) the confines of a customs search area because the previously unsuspected

[1] "When Glaziou and Lemieux were stopped they appeared to be extremely nervous and this heightened the officers' suspicions." 402 F. 2d 8, at 15.

individual talked to one who is found in possession of contraband cannot stand.[2] The Petitioner, Mary Ann Prader, respectfully requests this Honorable Court to grant its Writ to resolve the conflict on this issue and reaffirm the Fourth Amendment standards concerning inferences of "probable cause" or "reasonable suspicion" to search based on "mere association."

II.

WHERE A CUSTOMS INSPECTOR STATED HE HAD "REASONABLE SUSPICION" TO BELIEVE CONTRABAND WAS CONCEALED IN MIDRIFF AREA OF PETITIONER'S BODY, PETITIONER'S "VOLUNTARY" BARING OF HER MIDRIFF, DISCLOSING COMPLETE ABSENCE OF CONTRABAND, CANNOT BE SAID TO CREATE NEW "REASONABLE SUSPICION" TO JUSTIFY SEARCH OF OTHER AREAS OF HER BODY.

The Seventh Circuit's decision concerning the propriety of the search of Petitioner Susan Tucker conflicts directly with the decision of the Ninth Circuit in *United States* v. *Price*. Moreover, the Seventh Circuit's opinion raises serious, important questions concerning the constitutionally permissible parameters of border searches.

In *United States* v. *Price*, 472 F. 2d 573 (9th Cir. 1973), a strip search had been conducted on the basis of a female traveller's "nervousness" during questioning and a suspicious bulge around her waist. A majority of the court found the search to be excessive since early in the exam-

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[2] Certainly it is patent in our law that mere association cannot serve in any way to infer guilt of possession of narcotics. *United States* v. *Arroyave*, 477 F. 2d 157 (5th Cir. 1973); *Orozco-Vasquez* v. *United States*, 344 F. 2d 827 (9th Cir. 1965).

ination it became apparent that the suspicious bulge was simply body fat. That Court stated:

> . . . Their hunch thus disproved, the officer should have discontinued the search. They were not entitled, on the basis of Appellant's nervousness alone, to keep looking until they found something. We do not measure the reasonableness of a search by its result, but by the information on which the search was conducted. Here, the specific information "was of a very limited nature, and could be verified by a limited search. That is all that was, therefore, justified under the Fourth Amendment; the search of Appellant was, on these facts, excessive." (472 F. 2d 573, 574-75)

The Seventh Circuit in its Opinion (Appendix A) makes no attempt to distinguish *Price,* but merely points out that one judge dissented in *Price.*

Just as voluntary compliance with a "request"[3] to search a particular area can in no way indicate consent,[4]

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[3] The District Court and Seventh Circuit seemingly attach some special significance to the absence of a specific "request" put to Petitioner Tucker that she bare her midriff (Appendices A & B). One of the female Custom's employees assigned to search Petitioner Tucker stated that she informed the Petitioner that she was under suspicion mostly because she appeared to have a bulge on her abdomen below her waist (Tr. 31; 12/19/73). The detention of Petitioner and information imparted to her certainly constituted sufficient "request" (indeed compulsion) to cause Petitioner to display, without undergoing physical handling by the Customs employees, her bare abdominal area. This is a reasonable response, and it cannot reasonably be said that Petitioner's voluntary cooperation constituted "reasonable suspicion" anew to justify a more extensive physical search without warrant.

[4] *United States* v. *Ruiz-Estrella,* 481 F. 2d 723 (2d Cir. 1973), held the fact that defendant handed over a bag silently did not support inference of freely given consent; *United States* v. *Reincke,* 299 F. Supp. 132 (D. Conn.1964) noted that the act of a defendant who took off his coat and rolled up his sleeve in response to order by officers did not constitute consent.

neither should such compliance provide "suspicion" to justify a more extensive search.

The *Price* decision focused on the duty of Customs agents to focus their "reasonable suspicion" to provide a plausible factual basis. In *Price,* characterization of the suspect as "nervous" clearly was insufficient. Once search of the midriff—the area upon which suspicion of the Custom Inspector focused—disclosed nothing, "nervousness" alone was an insufficient basis upon which to continue and extend the search. Likewise, in the instant case, that the Custom's employees thought Petitioner's behavior odd in voluntarily cooperating with their initial request was not sufficient basis for renewed "reasonable suspicion."[5]

Here the Customs employees "got lucky," and found something. But this fact cannot justify detaining and disrobing countless women, in long dresses[6] or otherwise,

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[5] While the male Customs inspector in the instant case, whose suspicion initially was aroused with regard to Petitioner's midriff, ordered the search, the record discloses that one of the females conducting the search was employed by the Customs Service as a cashier. Thus, she cannot be presumed to have experience in assessing what types of behavior constitute basis for "reasonable suspicion" in any official sense.

[6] There is some testimony in the record concerning the Custom Inspector's observation that Petitioner Tucker was wearing a long dress. Is every woman wearing such a dress, very much in style, now subject to requests to disrobe at borders? Furthermore, it is to be noted that the "dress" the male Customs Inspector saw was a "skirt" in the eyes of the female Customs employees (Tr. 24, 25, 32; 12/19/73), and that a similar "suspicious" bulge observed by the male Customs Inspector in a similar dress worn by Petitioner Tucker at trial was attributable to the Petitioner's pregnancy (Tr. 25; 12/19/73).

at ports of entry across the nation.[7] This Honorable Court should resolve the conflict between circuits presented herein and delimit acceptable practices to safeguard the Fourth Amendment rights not only of Petitioner Tucker but of all those persons subjected to illegal and overbroad border searches.[8]

If mere designation of a search as a "border search" is not to serve to make *any and every* search reasonable and consistent with the Fourth Amendment, this Honorable Court should grant its writ to delimit the breadth of such searches.

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[7] Several federal courts have moved to limit the discretion of officials conducting border searches, especially in instances involving searches under clothing or "strip" and related searches. See *United States* v. *Murray*, 354 F. Supp. 604 (E.D. Penn. 1973), *United States* v. *Guadalupe-Garza*, 421 F. 2d 876 (9th Cir. 1970); *United States* v. *Selby*, 407 F. 2d 241 (9th Cir. 1969); *Henderson* v. *United States*, 390 F. 2d 805 (9th Cir. 1967). See also *United States* v. *Coughlin*, 338 F. Supp. 1328 (S.D. Mich, 1972), in which a defendant was stopped and searched with probable cause. Finding nothing, the police officer took the defendant to the police station where ultra-violet light revealed incriminating evidence, and the defendant thereupon confessed. The Court held that probable cause disappeared when the officer found nothing.

[8] "Recent hearings conducted by California's Representative Edward Roybal disclosed the following information drawn from an available sample:

> 'of the 1800 women stripped and searched (during a certain period) ony 285 (approximately 16%) were found carrying any contraband . . .' " (479 F. 2d 89, at 94).

The Petitioner contends that statistics like these are not nearly good enough to justify holding the activity presented under the instant set of facts as "reasonable", taking into account the "powerful hydraulic preessures throughout our history that bear heavily on the Court to water down constitutional guarantees . . ." (392 U.S. at 39; 407 U.S. at 161).

III.

WHERE PETITIONERS WERE NOT ADVISED BY THE COURT ACCEPTING THEIR GUILTY PLEAS OF A SPECIAL MANDATORY THREE-YEAR PAROLE TERM, THE PLEAS MUST BE VACATED.

The special mandatory three year parole term imposed by the Court on Petitioners Mary Ann Prader, Susan Prader Tucker, Ellen Sue Stewart and Sandra Stewart is part and parcel of the court's sentence.[9]

In accepting the respective guilty pleas of the Petitioners, the Court failed to advise them of the mandatory parole term. The Seventh Circuit attempted to vitiate this error by observing, in its opinion, that at the sentencing of Petitioners the Court discussed the parole term. It was, however, the duty of the Court to so inform Petitioners prior to the entry of their guilty pleas. *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 74 (1969).

The Seventh Circuit's decision conflicts with the Eighth Circuit's holding in *United States* v. *Richardson*, 483 F. 2d 516 (8th Cir. 1973). In *Richardson*, a narcotics conviction and sentence following a plea of guilty was vacated because, *inter alia*, the trial court did not inform the defendant of the special parole term, *despite the fact that the United States Attorney in Richardson recited the special parole term to the court, defendant and his attorney prior to sentencing*! *See also United States* v. *Valenciano*, 495 F. 2d 585 (3d Cir. 1974).

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[9] A violation of this parole results in an increased penalty and a new term of imprisonment which shall not be diminished by the time spent on special parole (21 U.S.C. § 960(e)).

As evidenced by the new Rule 11(c)(2) of the Federal Rules of Criminal Procedure, it is essential that defendants know the possible extent of sentence *prior to* taking the "crucial step." The new Rule merely clarifies the old Rule 11 requirement that the Defendant be informed of the "consequences of the plea." As *Richardson* held, pursuant to the old Rule, the requirement that a defendant pleading guilty be made aware by the Court of the special parole term prior to entry of the plea cannot be taken lightly.[10]

Petitioners respectfully request this Honorable Court to grant its writ to resolve the conflict between circuits and to substantiate the requirement that defendants pleading guilty be made aware of the extent of sentence.

IV.

WHERE THE RECORD IN A GUILTY PLEA DISCLOSES THE EXISTENCE OF A BARGAIN TO WHICH THE COURT DID NOT GIVE FULL EFFECT, THE GUILTY PLEA SHOULD BE VACATED, AND A VOLUNTARINESS HEARING CONDUCTED.

During the hearing at which Petitioners Prader and Tucker entered their guilty pleas, and again during the

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[10] Countless decisions among the Circuits have upheld the importance of the Court informing a defendant of the possible sentences involved. Among these are: *Harper* v. *United States*, 368 F. 2d 53 (10th Cir. 1966); *Smith* v. *United States*, 400 F. 2d 860 (6th Cir. 1968); *United States ex rel Crosby* v. *Briesley*, 404 F. 2d 790 (3 Cir. 1968); *Durant* v. *United States*, 410 F. 2d 689 (1st Cir. 1969); *Berry* v. *United States*, 412 F. 2d 189 (3 Cir. 1969); *Wade* v. *Wainwright*, 420 F. 2d 899 (5 Cir. 1969); *United States* v. *Perwo*, 433 F. 2d 1301 (5 Cir. 1970); *Jones* v. *United States*, 440 F. 2d 466 (2 Cir. 1971); *United States* v. *Smith*, 440 F. 2d 521 (7 Cir. 1971); *Paige* v. *United States*, 443 F. 2d 781 (4 Cir. 1971); *Moody* v. *United States*, 469 F. 2d 705 (8 Cir. 1972).

sentencing hearing, references by the prosecutor were made to the effect that these Petitioners had cooperated with the Government at all times subsequent to their arrest (Tr. 12; 1/16/74). In light of this cooperation, the prosecutor specifically declined to make a sentencing recommendation as to Petitioners Prader and Tucker, although he made such recommendation to all other co-indictees (Tr. 15; 1/16/74). Furthermore, the prosecutor requested the court to impose a less harsh sentence on Petitioners Prader and Tucker than would be imposed on the Stewarts, although he recommended only a brief period of incarceration for the Stewarts. (Tr. 5; 1/17/74).

The Court recognized the existence of a bargain of some sort between the Government and Petitioners Prader and Tucker, indicated by the fact that prior to acceptance of their pleas, the trial court referred to the prosecutor's request that the court treat them "more leniently" than the Stewarts (Tr. 12; 1/16/74). The trial court then asked Petitioner Mary Ann Prader:

> *Aside from that discussion,* have any other threats or promises been made to you to induce you to change your plea to guilty? (Tr. 12; 1/16/74) (Emphasis supplied)

Of Petitioner Susan Prader Tucker, the Court inquired:

> Have any *other* promises or representations or threats been made to you to induce you to change your plea to guilty? (Tr. 12; 1/16/74)

In fact, the trial court sentenced Petitioners Prader and Tucker to sentences identical with those ordered for the Stewart Petitioners, corresponding to each sister's relative degree of participation vis-a-vis her sibling. In

so doing, the trial court failed to adhere to a bargain that he had recognized as incident to "voluntariness" of the pleas entered by Petitioners Prader and Tucker.

The trial court has, therefore, acted contrary to the mandate set forth in *McCarthy* v. *United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969), and *Santobello* v. *New York*, 92 S. Ct. 495 (1971). The Seventh Circuit, in failing to exercise its supervisory powers with respect to these guilty pleas in the instant case has created a situation in which it is proper for this Honorable Court to exercise its supervisory powers to correct the resultant miscarriage of justice.[11]

V.

WHERE THE TRIAL COURT BEFORE WHICH A GUILTY PLEA IS ENTERED FAILS TO COMPLY IN ANY SUBSTANTIAL MANNER WITH RULE 11 AND THE RELEVANT INTERPRETIVE COURT DECISIONS, THE GUILTY PLEAS MUST BE VACATED.

With the advent of the new Rule 11, Petitioners respectfully suggest that the time is ripe for a reaffirmation of this Honorable Court's belief in the constitutional necessity of informing defendants of the nature of the charges and otherwise assessing voluntariness prior to the entry of guilty pleas. *Van Moltke* v. *Gillis*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948), *McCarthy* v.

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[11] See *United States* v. *McCarthy*, 433 F. 2d 591 (1st Cir.); *Kearns* v. *Field*, 432 F. 2d 68 (9th Cir. 1970); *Gilmore* v. *California*, 364 F. 2d 916 (9th Cir. 1966). The Seventh Circuit has, in other decisions, recognized that an on-the-record account of an unkept plea bargain requires a voluntariness hearing; *United States* v. *Shapiro*, 383 F. 2d 680 (7th Cir. 1967); *c.f. Moody* v. *United States*, (7th Cir. No. 73-1853, May 22, 1974).

United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 74 (1969); *Santobello* v. *New York,* 404 U.S. 257, 92 S. Ct. 495 (1971).

In the instant case, the Court failed to adequately advise Petitioners in many respects. The Stewarts were not advised that they had a right to confront witnesses. None of the Petitioners were advised that they had to be proven guilty beyond a reasonable doubt.[12] The trial court accepted the Stewarts' guilty pleas with respect to Count III of the Indictment despite that Court's pretrial ruling that venue as to Count III was questionable.[13] The trial court failed to inquire as to any of the Petitioner's real understanding of the charges, and failed to record an adequate factual basis for guilt.[14] Nothing at all was said by the Court concerning what constituted violation of 21 U.S.C. Sec. 963, although this charge was part and parcel of the conspiracy count,[15] nor was any inquiry made concerning whether any of the Petitioners were under the influence of narcotics at the time of the alleged offense or at the time of their guilty pleas.[16] Neither were any of the Petitioners told by the Court that a special three-year parole term was mandatory were they to be incarcerated after their guilty plea.[17]

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[12] See *McCarthy* v. *United States,* 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 74 (1969).

[13] See *United States* v. *Young,* 424 F. 2d 1276 (3d Cir. 1970).

[14] See *United States* v. *Sanders,* 435 F. 2d 1282 (10th Cir. 1970).

[15] See *Van Moltke* v. *Gillis,* 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948).

[16] See *Schnautz* v. *Beto,* 416 F. 2d 214 (5th Cir. 1969); *McNicholas* v. *United States,* 298 F. 2d 914 (4th Cir. 1962); *Manley* v. *United States,* 396 F. 2d 699 (5th Cir. 1968).

[17] See authorities cited at Point III of this Petition.

The Seventh Circuit, faced with all of these omissions, concluded:

> "that the court adequately addressed each defendant personally and determined that the plea was made voluntarily with understanding of the charge and the consequences of the plea as required by Rule 11 as it read at the time of the trial and as it now reads. (Opinion Appendix A)

The Petitioners contend that the Seventh Circuit's holding as to their guilty pleas violates the letter and spirit of Rule 11 and the relevant interpretive decisions, and respectfully request this Honorable Court to grant its Writ to review the decision.

CONCLUSION

For the foregoing reasons we respectfully petition this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 — APRIL SESSION, 1974

No. 74-1182
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL BROWN, COMETAS DILANJIAN, MARY ANN PRADER, SUSAN PRADER, THOMAS SHERIDAN, ELLEN SUE STEWART and SANDRA STEWART,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 630
THOMAS J. McMILLEN, *Judge.*

ARGUED JUNE 6, 1974—DECIDED JULY 3, 1974

Before CLARK, *Associate Justice,** SPRECHER, *Circuit Judge,* and BEAMER, *District Judge.***

SPRECHER, *Circuit Judge.* This appeal pivots upon the validity of a warrantless "border search" made at Chicago which resulted in the discovery of a large quantity of cocaine.

I

Seven defendants, including three men (Paul Brown, Cometas Dilanjian and Thomas Sheridan) and two sets of sisters (Mary Ann and Susan Prader, and Ellen Sue and Sandra Stewart) were indicted in Count I for con-

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** District Judge George N. Beamer of the Northern District of Indiana is sitting by designation.

spiracy in violation of 21 U.S.C. § 963 to import cocaine into the United States in violation of 21 U.S.C. § 952(a) and to distribute cocaine outside the United States knowing that it would be imported in violation of 21 U.S.C. § 959. In addition, the Prader sisters were indicted in Count II of importing 1,917.3 grams of cocaine in violation of section 952(a) and the Stewart sisters were indicted in Count III of distributing the same quantity knowing it would be imported, in violation of section 959.

The indictment alleged and all the defendants admitted at the time of pleading guilty to all counts that in March, 1973, the men and the Prader sisters discussed at Chicago, Illinois, the importation of cocaine; that on April 2, 1973, the Praders traveled by airplane from Chicago to Acapulco, Mexico; that on April 5, the Stewarts traveled from Peru, South America, where they received the cocaine, to Acapulco, where they delivered it to the Praders a few days later; and that on April 8, the Praders traveled by airplane from Acapulco to Chicago, carrying the 1,917.3 grams on their persons.

Mary Ann Prader had passed through Customs inspection at O'Hare International Airport on April 8 and was waiting a short distance from the inspection area for her sister. As Susan Prader was going through the Customs line, Customs Patrol Officer Goodson observed that her dress or skirt "fitted rather tightly at the waistline and then sort of flared out to a length to perhaps to her ankles" resulting in a bulge in the area of her stomach. He became suspicious because the clothing did not appear normal on her slender frame. Goodson then escorted Susan to a private search room and sought the assistance of Sharon Holihan and Violet Anderson, two female employees of the Customs Service.

According to Mrs. Holihan's testimony at the suppression hearing, "we were told by . . . Goodson that he was suspicious of Susan Prader because of her long clothing and mostly because she appeared to have a bulge on her abdomen below her waist." When the three women were alone, the Customs inspectors advised Susan that they were concerned with the bulge in the area of her waist or midriff, whereupon she voluntarily unzipped

her skirt, pushed it four to six inches below her waist to expose her abdomen, then held the skirt at that point for a few seconds and brought it back up.

Because this movement was done without any instructions from the Customs inspectors and because Susan "pushed the skirt down and then stopped . . . and brought it back up," Mrs. Holihan "became suspicious that perhaps she had something underneath her skirt further down on her legs." Without removing any clothing, Mrs. Holihan lifted Susan's skirt up from the bottom to above her knees where she discovered packages bandaged or taped to her legs. One of the inspectors then left the private room and advised Goodson of their discovery. After the contents of the packages were field tested and found positive, Goodson identified himself to Mary Ann and took her back to the inspection room, where similar packages were found taped to her legs.

An evidentiary hearing was held on December 19, 1973 upon the motions of Susan and Mary Prader to suppress the items seized from their persons at O'Hare Airport on April 8. On December 27, the court denied the motions in a written opinion in which it relied in part upon *United States* v *Robinson*, 414 U.S. 218 (1973).

On January 16, 1974, the three male defendants and the Prader sisters pleaded guilty and on the following day the Stewarts also pleaded guilty. In accepting the Praders' pleas, the district judge said that "I think you could preserve your right to appeal on . . . [the motion to suppress] even if you plead guilty, subject to that condition."

The government did not acquiesce in the "condition" purporting to preserve the right to appeal the suppression question. In fact the prosecutor pointed out that if pleading guilty did not result in the waiver of the right to appeal "every defendant that comes into the building . . . [for] sentencing to see what they get, and if they don't like what they get . . . then they take it up on appeal."

The three male defendants were each sentenced to three years' imprisonment, Susan Prader and Sandra Stewart

each to one year, and Mary Ann Prader and Ellen Sue Stewart each to six months' imprisonment.

All seven defendants appealed. The Praders argued that their motions to suppress should have been granted. The other defendants argued the voluntariness of their guilty pleas and their standing to seek suppression of the evidence found on the persons of the Praders.

The government argued that the Praders waived the suppression question by pleading guilty, that the other defendants had no standing to raise it, that in any event the suppression motions were properly denied, and that the guilty pleas were voluntary and in full compliance with FED. R. CRIM. P. 11.

II

The facts of this case in relation to the suppression question are quite similar to those in *United States* v. *Cox*, 464 F.2d 937, 944 (6th Cir. 1972), where the Sixth Circuit observed that "the district court allowed defendants the best of two worlds" in that "[t]hey were allowed to plead guilty to reduced charges, while reserving their right to appeal as if they had maintained innocence through trial." The court concluded that the procedure of allowing an appeal on nonjurisdictional grounds following intelligent and voluntary pleas of guilty violated public and judicial policy and "will not be countenanced in the future in this Circuit." 464 F.2d at 945. Nevertheless the court decided in that case to honor the agreement entered into between the defendants and the prosecutor and accepted by the district court, as being required by the plea bargaining process. In the present case the prosecutor did not consent to the availability of the right of appeal as part of any plea bargaining.

The rationale of *Cox* appears to find support in *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), where the Supreme Court said:

> We thus reaffirm the principle recognized in the *Brady* trilogy:[1] a guilty plea represents a break in

[1] Brady v. United States, 397 U.S. 742, 750 (1970), McMann v. Richardson, 397 U.S. 759, 770 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970).

> the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*. (Footnote supplied.)

However, as the *Cox* court, we hesitate to refuse to consider the merits of the suppression question inasmuch as the district court held out some reason for the defendants to believe that they were pleading guilty "subject to that condition," albeit lacking the consent of the prosecutor to that condition. *Cf. Santobello* v. *New York*, 404 U.S. 257, 262 (1971). We proceed therefore to a consideration of the propriety of the district court's denial of the motions for suppression.

III

Although Chicago is more than 1200 miles from the Mexican border, the search of the Prader sisters at O'Hare International Airport upon their arrival on a nonstop flight from Acapulco constituted a border search.[2]

19 U.S.C. § 482 provides in part as follows:

> Any of the officers or persons authorized to board or search vessels may stop, search and examine . . . any . . . person, on . . . whom he or they shall suspect there is merchandise which . . . shall have been introduced into the United States in any manner contrary to law . . .; and if any such officer or other person so authorized shall find any merchandise on or about any such . . . person . . . which he shall have reasonable cause to believe to have been unlawfully introduced into the United States . . ., he shall seize and secure the same for trial.

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[2] ". . . [A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

"When a person or vehicle is detained at the border just after entering the Country, the agent's statutory authority to search is virtually unfettered except perhaps as to due process concerning the manner, not the cause, of the search. . . . Presumably, they are limited only by common standards of decency and propriety." *United States* v. *Storm*, 480 F.2d 701, 104 (5th Cir. 1973). "Border searches, absent search warrants or probable cause, have been uniformly upheld by the courts as long as the customs agents have had a reasonable suspicion of violations of the customs laws." *United States* v. *Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973).

What is required to be balanced in any particular case is the level of suspicion of the agent against the level of indignity perpetrated upon the traveler. "Mere suspicion" does not justify a search within body cavities, *Henderson* v. *United States*, 390 F.2d 805, 808 (9th Cir. 1967), nor the administration of emetics, *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970). Although both of those cases obviously involved a greater indignity than simply a strip search, *Henderson* suggested that strip searches should require a "real suspicion," 390 F.2d at 808, and *Guadalupe-Garza* defined "real suspicion."

> "Real suspicion" justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

421 F.2d at 879.

The indignity in the present case did not rise to a stripping or strip search. Susan Prader, in a private room in the presence of two other women, voluntarily pulled her skirt a few inches down from her waist and bared her midriff for a few seconds. Shortly thereafter one of the female inspectors lifted Susan's ankle-length skirt to a point just above her knees. She was not requested to nor did she strip, nor did the female inspectors strip her.

The suspicion developed first in the mind of the male Customs inspector who found an incongruity in a long, flared skirt with a waistline bulge on a slender girl.

In *United States* v. *Berard,* 281 F. Supp. 328 (D. Mass. 1968), suspicious bulges on the persons of two travelers were found to warrant the opening of their shirts, which revealed them both to be bound in tape from waist to armpits with plastic bags of heroin. In *United States* v. *Glaziou,* 402 F.2d 8 (2d Cir. 1968), nervousness and a waistline bulge justified a touching and squeezing search which revealed heroin. In *Shorter* v. *United States,* 469 F.2d 61, 64 (9th Cir. 1972), heavy clothing in warm weather and a "bulge, or irregularity, in his shirt at the waist line" provided a sufficient basis for requiring the traveler to remove his overcoat and suit coat and to empty his pockets, whereupon he voluntarily lifted his shirt, revealing a waist girdle with plastic bags of heroin.

In *United States* v. *Price,* 472 F.2d 573 (9th Cir. 1973), a strip search had been conducted on the basis of a female traveler's nervousness during questioning and a suspicious bulge around her waist. Heroin and cocaine were eventually found concealed between her lower limbs. A majority of the court found the search to be excessive since early in the examination it became apparent that the suspicious bulge was simply body fat. In a dissenting opinion, Judge Kilkenny pointed out the distinction between a strip search and a body cavity search and concluded that the inspectors had a "real suspicion" sufficient to conduct the subsequent strip search.

In the present case there was no strip search. Susan Prader testified that none of her clothing had been removed. In addition, although Susan's voluntary baring of her midriff had indicated, as in *Price,* that the bulge at her waist was not contraband, that very act developed a new suspicion in the minds of the inspectors. As Mrs. Holihan testified, the quick, unrequested lowering of her skirt top a few inches but no lower, followed by the rapid pulling of the skirt back up, caused Mrs. Holihan to become suspicious "that perhaps she had something underneath her skirt further down on her legs." We conclude that the inspectors harbored "real suspicion." Both

Goodson and Holihan were experienced Customs inspectors, Goodson for thirteen years and Holihan for three years. The district judge who observed and heard the testimony concluded:

> The patrol officer had a reasonable suspicion concerning what might be on Susan's person, and this justified detaining her for a reasonable search of her person beyond the specified part which had aroused suspicion. . . . Furthermore the experienced searching agent acquired her own suspicion because of the defendant's actions during the initial search.
>
> The further search turned up the packages, and these in turn afforded the patrol officer with reasonable grounds to suspect sister Mary Ann who had been passed previously. . . . We see no reason why this subsequent suspicion need to occur only while the suspect was within the confines of the inspection area; Mary Ann was still inside the International Building, a mere fifteen feet outside the door of the inspection area, and she admittedly had no intention of leaving the building before her sister.

In *United States* v. *Glaziou*, 402 F.2d 8, 14-15 (2d Cir. 1968), two seamen had exited the pier gatehouse and were 200 feet up the street when the Customs officer noticed the waistline bulge around one of them. The court approved the search of both of them, concluding that "the officers were justified in searching Lemieux as soon as the contraband was uncovered on his companion." Here the material found on Susan was field tested and determined to be cocaine before Mary Ann was searched. The search of Mary Ann consisted also of only the lifting up of her skirt.

Upon the question of the possible indignity suffered by the sisters, the district judge found:

> Nor was this an offensive invasion of defendants' privacy. . . . The two searches which produced the results could have been performed by a thorough pat-down in public, particularly if defendants had not been wearing the long full skirts which in part caused the suspicion which led to the searches in the first place.

Actually the skirts of each girl were lifted in a completely private room in the presence only of the two female inspectors.

We conclude that the level of suspicion was high enough to justify the relatively dignified search to which both girls were subjected. The trial court correctly denied the motions to suppress the evidence obtained in the searches.

IV

Inasmuch as we find the searches and seizures relating to the Praders to have been justified, we need not consider the standing of the other defendants to challenge the evidence produced thereby. *Cf. Alderman v. United States*, 394 U.S. 165 (1969).

In regard to the interrogation of the defendants by the court before accepting their guilty pleas, we conclude that the court adequately addressed each defendant personally and determined that the plea was made voluntarily with understanding of the charge and the consequences of the plea as required by Rule 11 as it read at the time of the trial and as it now reads.[3]

Specifically, the Stewart sisters complained that they were not advised of the three-year special parole term, but prior to sentencing when they still had the opportunity to withdraw their guilty pleas, the court discussed the parole term in the presence of all defendants and their counsel.

In regard to defendant Sheridan, it was argued that it was not sufficiently determined whether his known use of methadone influenced his plea. The record shows that the court spent a relatively long period of time in the presence of all of the defendants at the acceptance of the pleas and again at sentencing and addressed all of them, including Sheridan, personally on several occasions. At sentencing, a representative of the Methadone Maintenance Institute was present and said:

[3] On April 23, 1974, the Supreme Court approved and transmitted to Congress, to take effect on August 1, 1974 if approved, amendments to the Federal Rules of Criminal Procedure, including an amended Rule 11. See Moody v. United States, ... F.2d .... (7th Cir.), No. 73-1853, May 22, 1974.

Mr. Sheridan is a patient at the Methadone Maintenance Institute. He has been very faithful in his attendance at the clinic. We have weekly therapy sessions. Mr. Sheridan has come to those sessions on a sort of regular basis. We feel that he is trying very hard to participate well in the program. We feel that his regular attendance is testimony to that fact.

Whereupon the following took place:

THE COURT: Well, Mr. Sheridan's statement to the probation officer is, apparently, that he was not getting very much treatment from your organization and apparently wasn't benefitting very much from it. Is that correct?

DEFENDANT SHERIDAN: No, sir. That was the Veterans Administration when I was under the program over there. I switched over to the Methadone Maintenance Institute which is much better, really.

THE COURT: When did you switch over?

DEFENDANT SHERIDAN: I started in August at the VA and I switched over in about September, I believe.

THE COURT: Of '73?

DEFENDANT SHERIDAN: Yes.

Inasmuch as Sheridan never contended that he was under the influence of drugs at the time of his plea, in view of his satisfactory treatment for about five months prior to his plea, and because of the court's close personal observation of him, we conclude that Sheridan's guilty plea, as that of the other defendants, was voluntary.

Convictions of all defendants are affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

United States Of America

vs.

Paul Brown, Cometas Dilanjian, Mary Ann Prader, Susan Prader, Thomas Sheridan, Ellen Sue Stewart and Sandra Stewart,

Defendants.

No. 73 CR 630

DECISION ON MOTION TO SUPPRESS

This case comes on to be heard on the motion of defendants Mary Ann Prader and Susan Prader to suppress certain packages seized from them individually at O'Hare International Airport in Chicago. The evidence shows that defendants are wouthful-appearing sisters, presumably citizens of the United States. They arrived on a through flight from Acapulco, Mexico on April 8, 1973, and Mary Ann Prader passed through customs and out into the corridor of the building without suspicion.

Susan Prader was then examined visually by a male U. S. Customs Service patrol officer who became suspicious when he thought he saw a bulge under the waistband of her skirt. She was then taken into a private ex-

amining room where she was turned over to a female customs' employee for searching. Thereupon, without any specific request, Susan turned down the top of her skirt and exposed no suspicious package. The searching agent (not the patrol officer) nevertheless became suspicious because of Susan's volunteered but somewhat hasty exposure of her midriff and asked her to lift her skirt up from the bottom. This revealed suspicious looking packages taped to this defendant's legs, and the patrol officer was notified of this.

He then proceeded through the custom service's door to the outside hallway and saw Mary Ann Prader standing there. She had not called a cab or otherwise sought to leave the building, and he brought her back into the private room. During this interval the contents of the packages taken from Susan's legs were field tested, and the searching agent was informed that the test was positive. She then searched Mary Ann's legs and found similar bandages and packages.

We find and conclude that both of these searches, and the detention of Mary Ann, were valid exercises of the police powers of the United States Customs Service and that the motions to suppress must be denied. The patrol officer has a reasonable suspicion concerning what might be on Susan's person, and this justified detaining her for a reasonable search of her person beyond the specified part which had aroused suspicion. cf. *United States* v. *Robinson*, ... U.S. ....., 42 U.S.L.W. 4055 (Dec. 11, 1973). Furthermore the experienced searching agent acquired her own suspicion because of the defendant's actions during the initial search.

The further search turned up the packages, and these in turn afforded the patrol officer with reasonable grounds to suspect sister Mary Ann who had been passed previously. *United States* v. *Holtz*, 479 F.2d 89 (9th Cir. 1973). We see no reason why this subsequent suspicion need to occur only while the suspect was within the confines of the inspection area; Mary Ann was still inside the International Building, a mere fifteen feet outside of the door of the inspection area, and she admittedly had no intention of leaving the building before her sister. *United States* v. *Glaziou*, 402 F.2d 8 (2nd Cir. 1968).

The patrol officer's suspicion on these two defendants was not purely subjective, as was the case in *United States* v. *Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1970). He testified to his objective observations, and they are not disputed in the evidence. Nor was this an offensive invasion of defendant's privacy as occurred in that case and in *Henderson* v. *United States*, 390 F.2d 805 (9th Cir. 1967). The two searches which produced the results could have been performed by a thorough pat-down in public, particularly if defendants had not been wearing the long full skirts which in part caused the suspicion which led to the searches in the first place. The case at bar is much closer to the facts and law of *United States* v. *Glaziou*, 402 F.2d 8 (2nd Cir. 1968) where a search by customs officers 200 feet from the point of entry was held to be a "border search" and was justified by a suspicious bulge. The difference between the bulge in that case and the bulge in the case at bar is that the latter did not contain any packages, but whether or not it in fact existed is a question of credibility. Since the officers' testimony was convincing, the bulge which he saw suffices as a basis for suspicion.

We do not need to go into the finer points of whether this was a "strip search" or some lesser or greater variation of one, because we believe both searches were entirely reasonable border searches under the circumstances. cf. *United States* v. *Sierra*, ... F.2d ..... (#73-2276 9th Cir. Nov. 7, 1973); *United States* v. *Forbicetta*, 484 F.2d 645 (5th Cir. 1973). We have examined the other decisions cited by the parties and find them to be either cumulative or inapplicable.

It Is Therefore Ordered, Adjudged And Decreed that the motion of the defendants Mary Ann Prader and Susan Prader to suppress evidence is denied, and this case will be called to be set for trial on Friday, December 28, 1973 at 10:00 a. m.

Enter:

/s/ .....

Judge, U. S. District Court

Dated: December 27, 1973

APPENDIX C

Constitution of the United States

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code

Title 21 § 963. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.

Federal Rules of Criminal Procedure

Rule 11.

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may re-

fuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 11.

Pleas

(a) *Alternatives.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) *Nolo contendere.* A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) *Advice to defendant.* The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

(d) ***Insuring that the plea is voluntary.*** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) *Plea agreement procedure.*

(1) *In general.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular

sentence, or will do both. The court shall not participate in any such discussions.

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of plea.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(4) *Rejection of plea.* If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of plea agreement procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraign-

ment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of plea discussions.* Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(f) *Determining accuracy of plea.* Nothwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-93

PAUL BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-138

MARY ANN PRADER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court failed to comply with the requirements of Rule 11, Fed. R. Crim. P., in accepting their guilty pleas; petitioners in No. 74-138 also contend that they were subjected to an unlawful border search.

Petitioners pled guilty in the United States District Court for the Northern District of Illinois to conspiring to import cocaine, in violation of 21 U.S.C. 963. In addition, petitioners Ellen Sue Stewart and Sandra Stewart pled guilty to distributing illegally imported

cocaine, in violation of 21 U.S.C. 959, and petitioners Susan Prader Tucker and Mary Ann Prader pled guilty to unlawfully importing cocaine, in violation of 21 U.S.C. 952(a). Petitioners Brown, Dilanjian, and Sheridan were each sentenced to a term of three years' imprisonment. Petitioners Susan Prader Tucker and Sandra Stewart were each sentenced to a term of one year's imprisonment. Petitioners Mary Ann Prader and Ellen Sue Stewart were each sentenced to a term of six months' imprisonment. Each petitioner was also sentenced to the special parole period of three years required by 21 U.S.C. 960. The court of appeals affirmed (Pet. App. A).[1]

The facts are set forth in the opinion of the court of appeals. Petitioners Mary Ann Prader and Susan Prader Tucker returned to the United States from Mexico on April 8, 1973. Upon passing through customs inspection at O'Hare International Airport in Chicago, Mrs. Tucker was stopped by Customs Patrol Officer Goodson, who was suspicious of the appearance of her skirt, which "fitted rather tightly at the waistline and then sort of flared out to a length to perhaps to her ankles" (Pet. App. 3). Goodson requested two female Customs employees to search Mrs. Tucker in a private room.

When the three women were alone, the Customs agents told Mrs. Tucker that a bulge in the midriff area of her skirt had aroused Goodson's suspicion. Mrs. Tucker then voluntarily exposed her abdomen momentarily and then quickly brought her skirt

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[1]"Pet. App." refers to the appendix to the petition in No. 74-93.

back up to its normal position. The court of appeals summarized the subsequent events as follows (Pet. App. 3-4):

> Because this movement was done without any instructions from the Customs inspectors and because Susan [Prader Tucker] "pushed the skirt down and then stopped * * * and brought it back up," Mrs. Holihan [a Customs inspector] "became suspicious that perhaps she had something underneath her skirt further down on her legs." Without removing any clothing, Mrs. Holihan lifted Susan's skirt up from the bottom to above her knees where she discovered packages bandaged or taped to her legs. One of the inspectors then left the private room and advised Goodson of their discovery. After the contents of the packages were field tested and found positive, Goodson identified himself to Mary Ann [Prader] and took her back to the inspection room, where similar packages were found taped to her legs.

Petitioners Prader and Tucker brought a motion to suppress the seized evidence, which the district court denied.

In January 1974, each petitioner pled guilty to the charges in the indictment. In accepting the Prader sisters' pleas, the district judge stated: "I think you could preserve your right to appeal on * * * [the motion to suppress] even if you plead guilty, subject to that condition" (Pet. App. 4). The prosecutor, however, expressly refused to acquiesce in any condition which would have reserved the right to appeal the suppression ruling (*ibid.*).

1. Petitioners contend that the district court failed to comply with Rule 11, Fed.R.Crim.P., in the course of accepting their guilty pleas.[2] The facts relating to each group of petitioners are as follows:

a. Petitioners Brown, Dilanjian, Sheridan,[3] Prader, and Tucker entered guilty pleas on January 16, 1974. The district court inquired whether each petitioner was satisfied with his or her representation (January 16 Tr. at 7) and whether each petitioner understood the consequences of a guilty plea as constituting a waiver of trial and of the right to confront witnesses

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[2]Rule 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[3]Petitioner Sheridan raises the contention that the court did not adequately resolve the question whether use of methadone affected his plea. This contention was properly rejected by the court of appeals (Pet. App. 12-13):

> The record shows that the court spent a relatively long period of time in the presence of all of the defendants at the acceptance of the pleas and again at sentencing and addressed all of them, including Sheridan, personally on several occasions. At sentencing, a representative of the Methadone Maintenance Institute was present and said:
>
> > Mr. Sheridan is a patient at the Methadone Maintenance Institute. He has been very faithful in his attendance at the clinic. We have weekly therapy sessions.

(*id.* at 8). The court then inquired whether each petitioner understood the maximum consequences of his plea (*id.* at 9-11). The court determined that each petitioner was aware of the plea conferences between counsel and the government and that their pleas were entered with an understanding of the sentences that the government would recommend. Petitioners indicated that their pleas were not induced by either promises or threats (*ibid.*). In addition, petitioners were questioned about the factual basis for their pleas, after which the court summarized the charges against them (*ibid.*).

> Mr. Sheridan has come to those sessions on a sort of regular basis. We feel that he is trying very hard to participate well in the program. We feel that his regular attendance is testimony to that fact.
>
> Whereupon the following took place:
>
> THE COURT: Well, Mr. Sheridan's statement to the probation officer is, apparently, that he was not getting very much treatment from you organization and apparently wasn't benefitting very much from it.
>
> Is that correct?
>
> DEFENDANT SHERIDAN: No sir. That was the Veterans Administration when I was under the program over there. I switched over to the Methadone Maintenance Institute which is much better, really.
>
> THE COURT: When did you switch over?
>
> DEFENDANT SHERIDAN: I started in August at the VA and I switched over in about September, I believe.
>
> THE COURT: Of '73?
>
> DEFENDANT SHERIDAN: Yes.
>
> Inasmuch as Sheridan never contended that he was under the influence of drugs at the time of his plea, in view of his satisfactory treatment for about five months prior to his plea, and because of the court's close personal observation of him, we conclude that Sheridan's guilty plea, as [those] of the other defendants, was voluntary.

Petitioners admitted having a conversation in which they planned to import cocaine unlawfully *(id.* at 13-14). The court then further developed the actual conduct of the conspiracy *(id.* at 15-17). There is no doubt that there was any misunderstanding of the charge against them or the existence of a sufficient factual basis for their plea.

b. Petitioners Ellen Sue Stewart and Sandra Stewart entered their guilty pleas on January 17, 1974. They were advised of their right to a jury trial and their attorney stated in open court that he "told them about * * * their right to a jury trial, their right to be confronted with witnesses and all of that" (January 17 Tr. at 4). They were then informed by the court that these rights would be waived by pleading guilty. Petitioners acknowledged this advice (*id.* at 4-5). The court questioned petitioners about their earlier plea conferences with the government and the government's expected recommendation of sentences (*id.* at 5). Petitioners indicated that no other promises or threats induced their pleas (*id.* at 6). The court then explained the charge to them, in terms similar to those used the previous day (*id.* at 6-7). Petitioners admitted their participation in the "conspiracy or agreement" as described by the court and their commission of the overt acts charged (*ibid.*). They also admitted transferring the cocaine to petitioners Prader and Tucker in Mexico knowing that it would be unlawfully imported into the United States (*id.* at 8). Petitioners were informed of the maximum imprisonment to which they would be liable, but the district court neglected to advise them at that time that they would also be subject to a mandatory three-year special parole term under 21 U.S.C. 960.

Petitioners' claims that the district court failed to comply with Rule 11 were correctly rejected by the court of appeals (Pet. App. 11):

> In regard to the interrogation of the defendants by the court before accepting their guilty pleas, we conclude that the court adequately addressed each defendant personally and determined that the plea was made voluntarily with understanding of the charge and the consequences of the plea as required by Rule 11 * * *.

Petitioners Ellen Sue Stewart and Sandra Stewart contend that they should have been advised of the three-year term of special parole. This contention was correctly rejected by the court of appeals on the ground that the district court had discussed the special parole term in their presence and in the presence of their counsel prior to sentencing, while they still had an opportunity to withdraw their guilty pleas (Pet. App. 12).

2. Petitioners Prader and Tucker contend that they were subjected to an unlawful search. These claims were waived by petitioners' guilty pleas. *Brady* v. *United States*, 397 U.S. 742, 750; *McMann* v. *Richardson*, 397 U.S. 759, 770; *Parker* v. *North Carolina*, 397 U.S. 790. As this Court stated in *Tollet* v. *Henderson*, 411 U.S. 258, 267:

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims

> relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

The court of appeals, however, felt constrained to consider petitioners' arguments, and we summarize the court's reasoning here, which we believe correctly disposes of the contentions.

a. Susan Prader Tucker claims that once she had bared her midriff, there was no longer any reasonable suspicion that would justify further search of her body. But the manner in which petitioner had quickly lowered and raised her skirt made one of the attending female agents suspicious. The court of appeals correctly found that petitioner's actions resulted in the creation of a "real suspicion" on the part of the Customs inspectors that justified the resulting search (Pet. App. 9). See, *e.g., United States* v. *Price*, 472 F. 2d 573 (C.A. 9). Border searches by Customs officials are not governed by the usual Fourth Amendment standard of probable cause (see, *e.g., Carroll* v. *United States*, 267 U.S. 132, 154), and the court of appeals correctly concluded "that the level of suspicion was high enough to justify the relatively dignified search to which both girls were subjected" (Pet. App. 11).

b. Mary Ann Prader claims that the Customs inspector had no independent basis for suspecting her other than her appearance of being friendly with her sister, who was immediately behind her in line. But Customs officials have traditionally been granted broad statutory authority to conduct searches of persons enter-

ing into the United States. See 19 U.S.C. 482. "The extraordinary deference accorded this unique category of searches is based on a recognition of the difficulty involved in effectively policing our national boundaries." *United States* v. *Hill*, 430 F. 2d 129, 131 (C.A. 5); *Klein* v. *United States*, 472 F. 2d 847, 849 (C.A. 9). Such searches do not require probable cause, but need only be reasonable. *United States* v. *McDaniel*, 463 F. 2d 129, 132 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *De La Cruz*, 420 F. 2d 1093, 1095 (C.A. 7); *Witt* v. *United States*, 287 F. 2d 389, 391 (C.A. 9), certiorari denied, 366 U.S. 950; *United States* v. *Glaziou*, 402 F. 2d 8, 12 (C.A. 2), certiorari denied, 393 U.S. 1121. The district court correctly found (Pet. App. 10):

> The further search [of Susan] turned up the packages, and these in turn afforded the patrol officer with reasonable grounds to suspect sister Mary Ann who had been passed previously. * * * We see no reason why this subsequent suspicion need to occur only while the suspect was within the confines of the inspection area; Mary Ann was still inside the International Building, a mere fifteen feet outside the door of the inspection area, and she admittedly had no intention of leaving the building before her sister.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.